563126

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Patricia Baker,

Appellant,

v.

Unifund CCR Partners,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The central question for this Court is whether the 5211 Address constituted Ms. Baker's center of domestic activity and, therefore, place of usual abode *at the time of service*. Unifund maintains that literal compliance with the statute is not required if the means employed are reasonably calculated to provide notice. Putting aside that, under Washington law, actual notice constitutes no sufficient service, for its claim that service of process—which allegedly occurred on December 16, 2006—was proper, Unifund relies solely on events that occurred *almost a year and more after service*.

Unifund effectively argues that, on December 16, 2006, Unifund reasonably calculated that leaving a copy of the summons and complaint at the 5211 Address would provide prompt notice to Ms. Baker at the time because she put the 5211 Address in response to the Debtor Interrogatories in 2007 or used the 5211 Address on the eight payments she made after 2007, which logic and argument are demonstrably flawed.

II. ARGUMENT

A. UNIFUND FAILS TO—AND IT CANNOT—SHOW THAT THE DOCTRINE OF EQUITABLE ESTOPPEL APPLIES.

In opposing Ms. Baker's motion for default, Unifund relied solely on *City of Seattle v. St. John*, 166 Wn. 2d 941 (2009) for the (misplaced) proposition that the doctrine of equitable estoppel barred Ms. Baker from moving the trial court under CR 60(b)(5). CP at 17. In her Brief ("Ap. Br."), Ms. Baker demonstrated why Unifund's reliance on *City of Seattle v. St. John* was improper. Ap. Br. at 20-24. Unifund does not address Ms. Baker's argument on appeal. Instead, Unifund now cites to *Lybbert v. Grant Cnty., State of Wash.*, 141 Wn.2d 29 (2000). Resp. Br. at 9-15. But, *Lybbert* is similarly unhelpful.

As discussed, a void judgment may be vacated at any time. Ap. Br. at 14. Still, Unifund argues that, under *Lybbert*¸ Ms. Baker "should be estopped from asserting insufficient service of process." Resp. Br. at 15. Unifund is wrong. In *Lybbert*, trial court granted the County's motion for summary

judgment based on the *affirmative defense* of insufficient service of process. *Lybbert*, 141 Wn.2d at 31. On appeal, one issue was whether the County was estopped from asserting the *affirmative defense* of insufficient service of process because, while counsel for the County had stated in the notice of appearance that the County was not waiving objections to improper service, the County, for the next nine months, acted as if it were preparing to litigate the case. *Id*. at 32. Although the Supreme Court concluded that the County was not equitably estopped from asserting the defense of insufficient service of process, Unifund maintains that *Lybbert's* principal controls because Ms. Baker meets the elements of estoppel. CP at 9-15.

Unifund confuses a pretrial dispositive motion based on the *affirmative defense* of insufficient service of process with a motion to vacate a void default judgment. Where a defendant appears in a case and files responsive pleadings or engages in discovery before the entry of a final judgment, the defendant is subject to the possible waiver of the affirmative defense of

insufficient service if the defendant fails to timely raise it or engages in conduct inconsistent with it. *See Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 326-327 (1994). In contrast, when a default judgment is entered against a defendant and is void for lack of personal jurisdiction, the defendant may challenge the void default judgment *at any time*. *Id*. "A party will not be deemed to have waived the right to challenge a default judgment void for lack of personal jurisdiction merely because time has passed since the judgment was entered." *Id*. at 326 (citing *Matter of Marriage of Leslie*, 112 Wn.2d 612, 619 (1989). "Under such circumstances, the trial court *must* vacate that judgment and has no discretion to do otherwise." *Id*. (citing *Leen v. Demopolis*, 62 Wn. App. 473, 478 (1991)).

Further, the facts of *Lybbert* are entirely different from the facts here. The County's active participation in the case before judgment made the County possibly subject to the doctrine of equitable estoppel and being estopped from asserting the affirmative defense of insufficient service of

process. Unifund has presented no evidence that Ms. Baker knew about the statute of limitations for Unifund's claim or that she strategically waited to vacate the judgment until after the limitation expired. In addition, the record reflects that Ms. Baker updated or tried to update her address. CP at 22. In any case, even if she "had known about the limitation period, [Unifund] offers no authority to support its contention that when a defendant learns about a void default judgment against [her] and knows the statute of limitation for the plaintiff's claim has not expired, [she] must try to vacate that judgment before the limitation does expire." *Khani*, 75 Wn. App. at 327. As an unrepresented person, Ms. Baker did not know or understand that she had an actual *judgment* against her. CP at 11. Even if that were not the case, like in *Khani*, "that [Ms. Baker] had actual notice of the judgment before the statute of limitation expired is irrelevant." *Khani*, 75 Wn. App. at 327. In sum, the doctrine of collateral estoppel does not apply.

B. MS. BAKER PRESENTED CLEAR AND CONVINCING EVIDENCE THAT SHE WAS NEVER SERVED AND THAT THE DEFAULT JUDGMENT IS THEREFORE VOID.

As a preliminary matter, the Affidavit of Service should be given no presumption of validity. An affidavit of service is presumed to be valid if it is regular in its form and substance. *State ex rel. Coughlin v. Jenkins*, 102 Wn. App. 60 (2000). Here, it falsely claims that Ms. Baker was a "resident" at the 5211 Address (CP at 5), which is substantively untrue. This falsity defeats the claimed presumption of validity. Unifund conveniently tries to ignore this fact by citing the part of the Affidavit of Service that claims that the 5211 Address was Ms. Baker "usual place of abode" to then argue that the burden is on Ms. Baker to establish by clear and convincing evidence that it was not. Resp. Br. at 16. But, given the indisputable falsity in the Affidavit of Service about the 5211 Address being Ms. Baker's residence—which raises the question of whether anything in it is true—the Affidavit of Service, including the

claim that the 5211 Address was Ms. Baker "usual place of abode," should not be presumed to be valid.

Even if the Affidavit of Service were valid, Ms. Baker has established by clear and convincing evidence that the 5211 Address was not her usual place of abode at the time of service. Unifund cites *Sheldon v. Fettig,* 129 Wn.2d 601, 607 (1996) for the proposition that the term "usual place of abode" is to be liberally construed. Resp. Br. at 16. But, "[l]iberal construction does not mean abandoning the statutory language entirely." *Farmer v. Davis*, 161 Wn. App. 420 (2011) (citing *Gerean v. Martin-Joven*, 108 Wn. App. 963 (2001)). Further, in *Sheldon*, while concluding that the facts supported the sufficiency of service, the court observed that "***most people generally maintain only one house of usual abode for service of process purposes***." *Sheldon*, 129 Wn.2d at 611 (emphasis added).

And, unlike in *State ex rel. Coughlin v. Jenkins*, where the court found that the defendant "provided little evidence that [the service address] was not the address at the time," Ms.

Baker provided ample evidence that the 5211 Address was not the center of her domestic activity *at the time of service*. Ap. Br. at 24-35. Unifund maintains that the evidence simply shows that she resided at a different address. Resp. Br. at 18. But, by definition, it also demonstrates that a different address was Ms. Baker's usual place of abode *at the time of service*: If Ms. Baker's co-resident at the different address had been left with process, that would have constituted proper substitute service because Ms. Baker resided at that address, which would, therefore, qualify as her usual abode under RCW 4.28.080(16).

Accordingly, under *Sheldon*, since Unifund effectively concedes that Ms. Baker has established that she resided at a different address at the time of service, the issue is whether the 5211 Address was Ms. Baker's *second* place of abode *at the time of service*. It was not. First, as the court noted, ***most people generally maintain only one house of usual abode for service of process purposes***. Second, Unifund's purported evidence does not even come close to the facts in *Sheldon* to support the

sufficiency of service on Ms. Baker. In *Sheldon*, eight months before process was served, the defendant had relocated to Chicago to begin a training program to work as a flight attendant. Before moving, she had lived on her own in Seattle and then Renton. Immediately before leaving for Chicago, she gave up her Renton apartment and moved back into her parents' Seattle home where she stayed for at least two months. She repeatedly used her parents' address as the place where she could be contacted before, during, and after this two-month period. Four months before her departure for Chicago, she was cited for speeding and gave her parents' Seattle address as her own. Upon moving back into her parents' home, she changed her address with the post office giving her parents' address as her own and continued having all her mail sent there for at least seven weeks after moving to Chicago. Two weeks after she went to Chicago, she registered to vote in Washington, swearing that she was a Washington resident living at her parents' address. Her car was registered at the same address.

When she moved to Chicago, she left her car with her father and gave him power of attorney to sell it. The address on the car insurance was changed to her parents' address and kept valid until the car was sold. When the car was sold, one and a half months before service of process, the bill of sale filed with the Department of Licensing listed the Seattle home as her address. Upon moving to Chicago, she left much of her personal belongings at her parents' house. She also left an inactive savings account in Seattle. Upon completion of the training program in Chicago, she took an apartment there with two other flight attendants. They signed a lease and moved in eight months before service was attempted. She then had all her mail sent to Chicago, joined a health club, and opened a checking account. But, she never got an Illinois driver's license but rather kept her Washington license, which used her former Renton address. Further, she never registered to vote in Chicago and remained registered in Seattle. As a flight attendant, she had blocks of time off, and, like her roommates, frequently flew

home. That she was frequently home was confirmed by her father who stated that during the month service was made, she spent perhaps four or five days at home and five or six the month before. The plaintiff sent a process server to the Seattle home who left the complaint and summons with the defendant's brother. The Supreme Court concluded that, since she used the Seattle home for "so many of the indicia of one's center of domestic activity," it was a center of her domestic activity. For example, the court noted that she had told the government to find her there if necessary for voting purposes, on her car registration, on the car's bill of sale, and on her speeding ticket; that she told her car insurer that that was her address; and that she returned home frequently when not in flight. The court also noted that her father had just done business for her under a power of attorney, was active in negotiating on her behalf in the matter at hand with the insurer and with opposing counsel, and was clearly looking out for her interests to the extent that she

would likely promptly receive notice if the summons were left there. *Sheldon*, 129 Wn.2d at 604-11.

Here, the facts come nowhere near the *Sheldon* facts (all of which—unlike here—focus on the defendant's domestic activities at the time of service) to warrant what would effectively constitute an exception to the notion that most people generally maintain only one house of usual abode for service of process purposes. And, unlike the defendant in *Sheldon* (who the Court noted had told the government to find her at her parents' home), Ms. Baker never listed the 5211 Address on her Driver's License. CP at 22. Nor has Unifund produced any evidence regarding Ms. Baker's connection to the 5211 Address at the time of service. Critically, while Unifund maintains that literal compliance with the statute is not required if the means employed are reasonably calculated to provide notice, Unifund—unlike in *Sheldon*—has produced no evidence why Unifund sent a process servicer to the 5211 Address on December 16, 2006 or why the means employed, *i.e.*, the

attempted service of process at the 5211 Address, were reasonably calculated to provide prompt notice. None.

Like in *Gerean*, "[n]othing in the record hints that [Unifund] made any attempt to find out [Ms. Baker's] current address or that [Ms. Baker] was not available to receive properly tendered service." *Gerean*, 108 Wn. App. at 974. Therefore, Unifund effectively argues that, on December 16, 2006, it reasonably calculated that leaving a copy of the summons and complaint at the 5211 Address would provide prompt notice to Ms. Baker at the time because she listed the 5211 Address in response to the Debtor Interrogatories in 2007 and used the 5211 Address on the eight payments she made after 2007, which logic and argument are demonstrably flawed.

In short, unlike Ms. Baker (who Unifund effectively admits has demonstrated that she resided and therefore had a center of domestic activity at the 53521 Address), Unifund has produced no evidence that the 5211 Address was Ms. Baker's (second) center of domestic activity at the time of service.

If this Court agreed with Unifund based on this record, that would not only be contrary to our jurisprudence and ignore the statutory language, but also lead to absurd results. In fact, in construing a statute, "a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results." *State v. J.P.*, 149 Wn.2d 444, 450 (2003) (citing *State v. Delgado*, 148 Wn.2d 723 (2003)). Here, one of the absurd results would be that a defendant could retroactively confer jurisdiction upon the trial court and validate a void judgment by simply using the service address as one's center of domestic activity any time after service even if the service address was not the defendant's place of abode at the time of service. To be clear, Ms. Baker disputes that (1) she used the 5211 Address as a center of domestic activity at any time (*see* CP at 11) or (2) Unifund's limited evidence (in the form of her response to *post-judgment* Debtor Interrogatories almost a year after service and the eight payments she made in the next year or so) establishes that the

5211 Address was a center of her domestic activity even after service. *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 541 (1997) (***continued use of address for voter registration and property tax billing address and to collect mail once or twice a month insufficient***); *Blankenship v. Kaldor,* 114 Wn. App. 312, 317 (2002) (***use of address on checking account insufficient***); *see also Vukich v. Anderson*, 97 Wn. App. 684, 690-691 (1999) (***keeping Washington driver's license with old address insufficient***); *Id*. (***continued delivery of mail to defendant at address where process served not determinative***). Such facts are irrelevant: They do not suggest the 5211 Address was the center of Ms. Baker's domestic activity *at the time of service*.

Assuming, *arguendo*, that such facts necessarily establish that the 5211 Address was the center of Ms. Baker's domestic activity *when she responded to the Debtor Interrogatories or made her eight payments*, they still do not establish that service was proper *at the time of service*. It would defy logic to claim otherwise. Again, Unifund has presented no evidence of Ms.

Baker using the 5211 Address at the time of service for any purpose. If Unifund prevailed based on this record, that would absurdly mean that, by simply using the service address after service, Ms. Baker retroactively conferred jurisdiction upon the trial court and validated the otherwise void judgment. Along those same lines, that would also create an improper chilling effect where defendants would be concerned about ever using an address where someone may have attempted to serve them to avoid being possibly subject to the court's jurisdiction even if they had no connection to that address at the time of service. While Unifund claims that Ms. Baker does not deny using the 5211 Address for her "financial activities during the time of service," Ms. Baker specifically testified that the 23521 Address was her "permanent address / only place of abode until after about May 7, 2014"; that she never "resided at / used as [her] place of abode the [5211 Address]"; that she "tried multiple times by phone to have [her] only physical /place of abode address reflect the correct address at the time to no avail;

and that "[t]he only dwelling place [she] maintained and used as [her] residence / place of abode on December 16, 2006 was [the 23521 Address]." CP at 22.

The only so-called evidence closest to the date of service Unifund provides is the two phone calls Ms. Baker allegedly placed in January 2007. But, Unifund's declaration does not state that Ms. Baker called specifically in response to the summons, nor does it allege that Ms. Baker was apprised of the lawsuit. Assuming, *arguendo*, she had notice, the alleged service on December 16, 2006, was still insufficient: The two calls simply do not establish that the 5211 Address was the center of her domestic activity at the time of service and that process left with a resident there was necessarily reasonably calculated to come to her attention promptly. For example, if the chances of someone receiving prompt notice at a given address are one out of one hundred, that address obviously would not constitute that person's usual place abode. Even if that person hits the jackpot by receiving prompt notice, due to

the highly low probability of this occurrence, that notice still does not establish that that address is that person's center of domestic activity. Nor does the actual notice constitute sufficient service of process. *See Farmer v. Davis*, 161 Wn. App. 420 (2011) (***attempted service at defendant's former address held insufficient despite actual notice to defendant***). "***[A]ctual notice does not constitute sufficient service***. [*Thayer v. Edmonds*, 8 Wn. App. 36, 40 (1972).] ***Proper service requires actual service on the defendant or at her abode***." *Gerean v. Martin-Joven*, 108 Wn. App. 963, 972 (2001).[1] Indeed, in *Lepeska* and *Gerean*, that a defendant resided with parents at the time of an auto accident and later received actual notice of later delivery of a summons and complaint to that address was not sufficient substitute service. *Lepeska*, 67 Wn. App. at 551–52; *Gerean*, 108 Wn. App. at 972. While Ms. Baker did respond to the post-judgment Debtor-Interrogatories, she indisputably did not respond to Unifund's default motion,

[1] Emphasis added.

which Unifund claims to have mailed to the 5211 Address. Resp. Br. at 19. The reasonable inference is that, had Ms. Baker received the default motion, she would not have ignored it, like she did not ignore the Debtor Interrogatories after she learned of them albeit "barely in time to appear in court." CP at 11. Under the circumstances, that Ms. Baker did not respond to the default motion further supports that the 5211 Address was not her usual place of abode or center of domestic activity.

Unifund is also incorrect in other respects. For example, Unifund incorrectly claims that Ms. Baker provides an "apparent contradiction" in her declaration when she states that she learned about the court case for the first time when visiting a relative in or about November 2007 "who was basically accidently given what I perceived at the time as my subpoena papers." Resp. Br. at 20. Unifund further incorrectly asserts that "it does not follow that when using an address for financial and mailing activities that Baker just randomly visited a relative and would accidently come upon service documents." First, Ms.

Baker did not come upon any "service documents" because what she received at the time was a "subpoena letter," along with "a Debtor Interrogatories Form," not "service documents." CP at 11. The "service documents" had been allegedly left with "Brenda" about one year before that. CP at 5. Second, Ms. Baker's declaration does not state that she "randomly" visited a relative or "accidentally [came] upon service documents." CP at 11. Third, Unifund's criticism is misleading because Ms. Baker had not yet given Unifund the 5211 Address: She completed the post-judgment Debtor Interrogatories (where she listed the 5211 Address) only after she received them in or about November 2007. *Id*. To this day, including considering that Ms. Baker had a different address on her Driver's License (CP at 22), Unifund has not explained why it sent its server of process to the 5211 Address on December 16, 2006, or why Unifund took it upon

itself to send any mail there;[2] Ms. Baker had all the reasons to not have expected Unifund's mail and be surprised by it.

Finally, Unifund wrongfully faults Ms. Baker for not "object[ing] to service of the summons" or "provid[ing] a different address despite knowing that Plaintiff and the Court was using the 5211 Address." Resp Br. 21. As a preliminary matter, in late 2007-2008, about a year and more after alleged service, due to the issues with and safety concerns pertaining to her ex-husband, Ms. Baker did use the 5211 Address for a limited purpose, which is why she listed that address in response to the Debtor Interrogatories and on her payments. CP at 22. Notably, Unifund has produced no evidence that, had she provided a different address—whether it be in response to the post-judgment Debtor Interrogatories, on her payments, or on the phone—Unifund would have vacated the judgment, which

[2] While she did use the 5211 Address "basically as a PO BOX" in "late 2007-2008, the time period referred to in [Unifund's] response" (CP at 22), she had not listed it in response to the Debtor Interrogatories until after she received them.

is highly improbable. Instead, Unifund would have likely simply ignored it and continued to collect on the judgment. As such, it seems disingenuous that Unifund would fault her for not providing a different address, which she actually testified that she did provide or try to provide to Unifund. *Id*.

III. CONCLUSION

Unifund confuses a pretrial dispositive motion based on the *affirmative defense* of insufficient service of process with a motion to vacate a void default judgment, nor has Unifund provided any evidence of Ms. Baker's actions that Unifund relied upon in trying to serve her at the 5211 Address. Simply put: The doctrine of collateral estoppel does not apply. And because Ms. Baker has shown with clear and convincing evidence that the address where Unifund claims it served her was not her place of usual abode at the time of service, the default judgment against her was void. The Court should reverse and remand for vacation of the default judgment and other requested proceedings consistent with the decision.

Respectfully submitted this 21st day of July 2022.

I certify that this document contains 3,930 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am employed at Boris Davidovskiy, P.C., attorney of record for Appellant herein.

On July 21, 2022, I caused a true and correct copy of the foregoing document to be (1) filed with the Court of Appeals, Division II and (2) be duly served on each and every attorney of record and party listed herein in the matter indicated:

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DATED this 21st day of July 2022 at Edmonds, Washington.

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/s/ Boris Davidovskiy

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